Singham Sulaiman Sdn Bhd (t/a Jones Lang Wootton) v Mega Palm Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S-22–255 OF 2009
SU GEOK YIAM J
9 JUNE 2013

Contract — Agency — Sale of land — Whether valid and binding oral agency contract existed — Whether terms of alleged contract vague uncertain and incapable of being made certain — Whether plaintiff neither introduced lands to purchaser nor secured purchaser's offer to buy — Whether plaintiff was efficient/effective cause of sale of lands — Contracts Act 1950 s 30

The plaintiff's claim in the instant suit for unpaid real estate agency fees turned on whether it had a valid and binding contract of agency with the defendant in respect of the sale of its two parcels of land ('the lands'). The plaintiff pleaded that its deputy chairman and executive director, Sulaiman Mustafa ('Sulaiman') was orally appointed to sell the lands by the chief executive officer of Country Heights' property development division, Dato CS Ong, and that the latter told Sulaiman the plaintiff's professional fees would be 2% of the sale price of the lands excluding service tax. The plaintiff pleaded that it had no reason to doubt Dato CS Ong's representation because it had had a long-standing business relationship with Country Heights ('CH') and the defendant belonged to the CH group of companies. The plaintiff claimed that on the strength of Dato CS Ong's appointment it secured two interested buyers ('Mayland') for the lands; advised CH on the suitable sale prices for the lands; furnished Mayland with all requisite information concerning the lands and even took its representatives on a site visit to the lands. It was alleged that the plaintiff was subsequently by-passed and that CH and/or the defendant negotiated directly with Mayland to conclude the terms of the sale and purchase of the lands. On discovering that the sale of the lands had been concluded the plaintiff forwarded its claim for professional fees and service tax but the same was not paid. The defendant contended that neither it nor CH appointed the plaintiff as its estate or marketing agent to sell the lands and that there was no agreement whatsoever to pay the plaintiff's fees.

Held, dismissing the claim:

(1) The plaintiff failed to prove its claim on balance of probabilities. There was no positive evidence to establish a valid oral appointment of the plaintiff as an estate agent by the defendant for the sale of the lands. In any event, the plaintiff failed to establish that its efforts were the effective cause of the sale of the lands (see paras 52 & 135).

(2) The court was of the view that by virtue of s 30 of the Contracts Act 1950, no valid agency contract existed between the plaintiff and the defendant because the terms of the alleged contract relied upon by the plaintiff were vague, uncertain and incapable of being made certain (see para 114).

(3) The evidence showed that Dato CS Ong merely informed Sulaiman of the properties of the CH group of companies which were available upon Sulaiman's enquiry and the understanding was for Sulaiman to revert to Dato CS Ong if he had interested buyers for any of the properties of the group in order to take instructions on the sale price and to agree on the plaintiff's fee. The parties had not spoken about the plaintiff's remuneration, let alone have reached consensus ad idem on the issue of fees. Sulaiman and/or the plaintiff did not revert to Dato CS Ong to inform that Mayland was an interested purchaser and to get instructions on the sale price of the lands. There was no agreement whatsoever arrived at between them on the fees payable to the plaintiff concerning the lands (see paras 79, 98–99 & 110).

(4) The evidence showed that the person who introduced the lands to Mayland was Tan Sri Lee Kim Yew of the CH group of companies and not Sulaiman and/or the plaintiff. At the time the sale of the lands were concluded Tan Sri Lee Kim Yew and Dato CS Ong were not aware of any dealings between the plaintiff and Mayland with regard to the lands. All negotiations leading to the sale of the lands were between Tan Sri Lee Kim Yew and Dato CS Ong on behalf of the defendant and Tan Sri David Chiu and Low Gay Teck (the vice-chairman and managing director, respectively) on behalf of Mayland (see paras 100–102).

(5) Even if it was assumed for a moment that there was a valid contract between the plaintiff and the defendant, the court found that the plaintiff was not the effective cause of the sale of the lands to Mayland. The evidence showed that all that the plaintiff did was to provide information to Mayland and arrange for a site visit of its representatives to the lands. The plaintiff did not secure any offer from Mayland to purchase the lands. An agent's right to commission did not arise out of the mere fact he had introduced a purchaser as being a *cause sine qua non*. The plaintiff had to go further and show the introduction was an effective cause in bringing about the sale of the property ie the *cause causan* for the sale of the property (see paras 104–105, 116 & 120).

[Bahasa Malaysia summary

Tuntutan plaintif dalam guaman ini bagi fi agensi hartanah yang tidak berbayar membangkitkan sama ada ia mempunyai kontrak agensi yang sah dan mengikat dengan defendan berkenaan jualan dua bidang tanah ('tanah-tanah tersebut). Plaintif-plaintif memplidkan bahawa naib pengerusi dan pengarah

eksekutifnya, Sulaiman Mustafa ('Sulaiman') telah dilantik secara lisan untuk menjual tanah-tanah tersebut oleh Ketua Pengarah Eksekutif Country Heights bahagian pembangunan hartanah, Dato CS Ong dan bahawa beliau telah memberitahu Sulaiman bahawa fi profesional plaintiff adalah 2% daripada harga jualan tanah tidak termasuk cukai perkhidmatan. Plaintif memplidkan bahawa ia tidak mempunyai sebarang sebab untuk meragui perwakilan Dato CS Ong kerana mempunyai hubungan perniagaan yang lama dengan Country Heights ('CH') dan defendan dimiliki kumpulan syarikat CH. Plaintif mendakwa bahawa dengan kekuatan pelantikan Dato CS Ong, ia berjaya mendapatkan dua orang pembeli yang berminat ('Mayland') bagi tanah-tanah tersebut; menasihati CH mengenai harga jualan yang bersesuaian bagi tanah-tanah tersebut; membekalkan Mayland dengan maklumat-maklumat yang diperlukan mengenai tanah-tanah tersebut dan malah membawa wakil-wakilnya membuat lawatan tapak tanah-tanah tersebut. Didakwa bahawa plaintif kemudiannya dipintas dan bahawa CH dan/atau defendan telah berunding secara langsung dengan Mayland untuk memutuskan terma jual dan beli tanah-tanah tersebut. Apabila mendapat tahu bahawa jualan tanah-tanah tersebut telah disimpulkan, plaintif menghantar tuntutan bagi fi profesional dan cukai perkhidmatannya tetapi tidak dibayar. Defendan menghujahkan bahawa ia mahupun CH tidak melantik plaintif sebagai ejen hartanah atau pemasarannya untuk menjual tanah-tanahnya dan bahawa tiada sebarang perjanjian untuk membayar fi plaintif.

Diputuskan, menolak tuntutan:

(1) Plaintif gagal membuktikan tuntutannya atas imbangan kebarangkalian. Tiada keterangan positif untuk membuktikan pelantikan lisan sah plaintif sebagai agen hartanah oleh defendan bagi jualan tanah-tanah tersebut. Dalam apa jua keadaan, plaintif gagal untuk membuktikan bahawa usahanya adalah kausa efektif jualan tanah-tanah tersebut (lihat perenggan 52 & 135)

(2) Mahkamah berpendapat bahawa bahawa menurut s 30 Akta Kontrak 1950, tiada kontrak agensi yang sah wujud antara plaintif dan defendan kerana terma kontrak yang disandarkan oleh plaintif adalah kabur, tidak pasti dan tidak berupaya untuk dijadikan jelas (lihat perenggan 114)

(3) Keterangan menunjukkan bahawa Dato CS Ong hanya sekadar memaklumkan kepada Sulaiman mengenai hartanah-hartanah kumpulan syarikat CH yang sedia ada apabila ditanya oleh Sulaiman dan pemahamannya adalah bagi Sulaiman untuk kembali kepada Dato CS Ong jika dia mempunyai pembeli-pembeli yang berminat terhadap mana-mana hartanah kumpulan tersebut untuk bertindak atas arahan harga jualan dah bersetuju dengan fi plaintif. Pihak-pihak tidak berbincang mengenai gaji plaintif, apatah lagi untuk mencapai consensus ad idem mengenai isu fi. Sulaiman dan/atau plaintif tidak kembali

kepada Dato CS Ong untuk memaklumkannya bahawa Mayland merupakan pembeli yang berminat dan untuk mendapatkan arahan mengenai harga jualan tanah-tanah tersebut. Tiada sebarang perjanjian yang disimpulkan antara mereka mengenai fi yang perlu dibayar kepada plaintif bagi tanah-tanah tersebut (lihat perenggan 79, 98–99 & 110).

(4) Keterangan menunjukkan bahawa pihak yang memberitahu mengenai tanah-tanah tersebut kepada Mayland adalah Tan Sri Lee Kim Yew daripada kumpulan syarikat CH dan bukan Sulaiman dan/atau plaintif. Ketika itu, jualan tanah-tanah tersebut diputuskan oleh Tan Sri Lee Kim Yew dan Dato CS Ong tidak sedia maklum akan sebarang urusan antara plaintif dan Mayland berkenaan tanah-tanah tersebut. Kesemua rundingan yang membawa kepada jualan tanah-tanah tersebut antara Tan Sri Lee Kim Yew dan Dato CS Ong bagi pihak defendan dan Tan Sri David Chiu dan Low Gay Teck (masing-masing naib pengerusi dan pengarah urusan) bagi pihak Mayland (lihat perenggan 100–102).

(5) Jika pun disimpulkan seketika bahawa terdapat satu kontrak sah antara plaintif dan defendan, mahkamah mendapati bahawa plaintif bukanlah kausa efektif kepada jualan tanah-tanah kepada Mayland. Keterangan menunjukkan bahawa apa yang dilakukan oleh plaintif adalah memperuntukkan maklumat kepada Mayland dan mengatur satu lawatan tapak wakil-wakilnya ke tanah-tanah tersebut. Plaintif tidak berjaya mendapatkan sebarang tawaran daripada Mayland untuk membeli tanah-tanah tersebut. Hak seorang agen terhadap komisyen tidak berbangkit daripada sekadar fakta bahawa dia telah memperkenalkan seorang pembeli sebagai seorang yang *cause sine qua non*. Plaintif perlu bertindak lebih lanjut dan membuktikan bahawa perkenalan tersebut adalah satu kausa efektif dalam membawa kepada jualan hartanah tersebut iaitu *cause causan* bagi jualan hartanah (lihat perenggan 104–105, 116 & 120).]

Notes

For a case on sale of land, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2933.

Cases referred to

Chew Teng Cheong & Anor v Pang Choon Kong [1981] 1 MLJ 298; [1983] CLJ (Rep) 86, FC (refd)

Colliers International (Singapore) Pte Ltd v Senkee Logistics Pte Ltd [2007] 2 SLR (R) 230, HC (refd)

Deans Property Pte Ltd v Land Estates Apartments Pte Ltd & Anor [1994] 3 SLR (R) 804, CA (refd)

Desa Samudra Sdn Bhd v Bandar Teknik Sdn Bhd & Ors [2012] 1 MLJ 729, FC (not folld)

Emporium Holdings (Singapore) Pte Ltd v Knight Frank Cheong Hock Chye & Baillieu (Property Consultants) Pte Ltd [1994] SGCA 147, CA (refd)

Ng Yun Yun v Chin Fook Ching [2010] 1 LNS 605, HC (refd)

Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd [1986] 2 MLJ 30, SC (refd)

Tang Chioksing v Lian Fatt Sawmill Co [1976] 2 MLJ 241, FC (refd)

Tong Lee Hua v Yong Kah Chin [1979] 1 MLJ 233, FC (refd)

Legislation referred to

Contracts Act 1950 s 30

Evidence Act 1950 s 114(g)

Valuers, Appraisers and Estate Agents Act 1981

Valuers, Appraisers and Estate Agents Rules 1986 r 92(1), Seventh Schedule, Part C(1)(a)

N Chandran (Ranjan Chandran with him) (Ranjan Chitravathy & Nik) for the plaintiff.

Lee Chin Peow (Lee Partnership) for the defendant.

Su Geok Yiam J:

THE PLAINTIFF'S ACTION

[1] The plaintiff initially filed this action on 16 April 2009 vide a writ of summons, encl (1), and a statement of claim ('SOC'), encl (2) against Country Heights Holdings Bhd ('CH') as the first defendant and Mega Palm Sdn Bhd as the second defendant.

[2] The plaintiff, subsequently, amended its writ of summons and SOC on 19 May 2011.

[3] On 26 May 2011, the plaintiff filed its amended writ of summons and writ amended statement of claim (the 'amended SOC'), encl (27) in which CH was deleted as the first defendant thereby leaving Mega Palm Sdn Bhd as the sole defendant and all references to the original first defendant have been replaced with CH and all references to the second defendant have been replaced with defendant.

[4] In this action, the plaintiff is claiming for a sum of RM1,214,069.47 (the 'sum claimed') being the plaintiff's real estate agency fee for having successfully marketed and introduced two parcels of land to two fully owned subsidiaries of Malaysia Land Properties Sdn Bhd ('Mayland'), namely, Mayland Success Sdn

Bhd and Mayland Supreme Sdn Bhd.

BACKGROUND

[5] The plaintiff is at all material times, the proprietor of Jones Lang Wootton, an international property consultant, registered valuer, property manager and real estate agent.

[6] The plaintiff has alleged that the defendant is a related company of Country Heights Holdings Bhd ('CH') being a fully owned subsidiary of CH, CH is a property conglomerate, CH is the holding company in the corporate structure of the Country Heights Group of Companies, Country Heights Properties Sdn Bhd is also a subsidiary of CH and that both the defendant and Country Heights Properties Sdn Bhd are part of the Country Heights Group of Companies.

[7] The defendant was the registered proprietor of two parcels of land.

[8] They comprise a parcel of 7 acres of vacant residential land known as 'Daman' held under HSD 113436, PT No 24005, Mukim Batu, Daerah Kuala Lumpur, State of Wilayah Persekutuan and a parcel of 3.2 acres of vacant commercial land known as 'Sara' held under HSD 113439, PT No 24012, Mukim Batu, Daerah Kuala Lumpur, State of Wilayah Persekutuan ('the two parcels of land').

[9] The plaintiff has alleged that Daman was subsequently sold by the defendant to one Success Sdn Bhd (now known as Mayland Success Sdn Bhd) for a sale price of RM36,574,860 vide a sale and purchase agreement entered into between the defendant and Success Sdn Bhd on or about September 2007 through the professional efforts of the plaintiff in introducing and marketing it to Mayland. The plaintiff claimed that this sale price was based on RM120 per sqft which was the acceptable sale price recommended by the plaintiff to Mayland prior to the sale.

[10] The plaintiff has alleged that Sara was subsequently sold by the defendant to Supreme Objectives Sdn Bhd (now known as Mayland Supreme Sdn Bhd) for a sale price of RM21,604,164 vide a sale and purchase agreement entered into between the defendant and Supreme Objectives Sdn Bhd on or about November 2007 through the professional efforts of the plaintiff in introducing and marketing it to Mayland. This sale price was based on RM155 per sqft.

[11] The plaintiff has alleged that the two parcels of land were within the

development known as 'Country Heights Damansara' ('CHD') and that CHD is a property development under CH encompassing the sale and development of both residential and commercial plots of land, including amongst others, the two parcels of land.

[12] The plaintiff initially alleged that at or about early 2007, it was appointed as the marketing agent of the defendant by CH for the sale of the two parcels of land without specifying whether the appointment was oral or in writing.

[13] Subsequently, in its amended SOC, the plaintiff alleged it was appointed as the estate agent of the defendant for the sale of the two parcels of land pursuant to an oral agency contract between Dato' CS Ong as the Chief Executive Officer ('CEO') of the Property Development Division of CH on behalf of the defendant and Mr Sulaiman bin Mustafa of the plaintiff and that the plaintiff's professional fees payable would be 2% of the sale price of the two parcels of land, not including government tax of 5%.

[14] The plaintiff claims (in the amended SOC) that at the time of the appointment of the plaintiff in early 2007, CH did not reveal to the plaintiff that CH was not the registered owner of the two parcels of land but said that the two parcels of land were under the development project of CH, ie CHD, and CH represented that CH had authority to deal with the two parcels of land.

[15] The plaintiff claims (in the amended SOC) that at the time of the appointment of the plaintiff in early 2007, the title deeds for the two parcels of land had not yet been sub-divided by the relevant authorities and the two parcels of land were still being held under one master title.

[16] The plaintiff claims (in the amended SOC) that at the time of its appointment as the estate agent for the defendant, the plaintiff was only given a copy of the 'site layout plan' by CH for the development area of CHD which portrayed Daman as 7.08 acres and Sara as 3.2 acres and the plaintiff marketed the two parcels of land relying on the 'site layout plan'.

[17] The plaintiff claims (in its amended SOC) that at every material point, CH was an old client of the plaintiff where the plaintiff constantly dealt with various land matters with CH and numerous other companies under the Country Heights Group of Companies on trust, hence, there did not exist any reasonable grounds for the plaintiff to doubt CH's representation that they had the authority to deal with the two parcels of and that based on the said previous business relationship and also based on the trust placed on CH and Dato' CS Ong, the plaintiff began efforts to market the two parcels of land for sale.

A **[18]** The plaintiff initially claimed that one of the terms and conditions of the marketing agency appointment of the plaintiff by CH and/or the defendant was that the plaintiff markets the two parcels of land to potential purchasers in a discreet manner in order to safe guard CH's interests as a public listed company.

B

[19] The plaintiff, subsequently, claimed (in its amended SOC) that one oral instruction given by Dato' CS Ong to the plaintiff as the estate agent of CH and/or the defendant was that the plaintiff markets the two parcels of land to potential purchasers in a discreet manner in order to safe guard CH's interests C as a public listed company and that it was understood and orally agreed between Dato' CS Ong from CH for and on behalf of the defendant and Encik Sulaiman bin Mustafa of the plaintiff that the plaintiff's professional fees would be 2% of the sale price of the two parcels of land excluding government tax of 5%.

D

[20] The plaintiff claimed initially that CH requested advice from the plaintiff regarding the sales prices for the two parcels of land and the plaintiff recommended to CH the asking prices and acceptable prices in respect of the two parcels of land.

E

[21] The plaintiff, subsequently, claimed (in its amended SOC) that the CH for and on behalf of the defendant requested expert advice from the plaintiff regarding the sales prices for the two parcels of land; the plaintiff gave F professional advice to CH regarding the asking prices and acceptable prices in respect of the two parcels of land and the said professional advice of the plaintiff was later used by CH in the sale transactions of the two parcels of land; and the asking price for the Daman was advised by the plaintiff to be RM150 per sqft and the acceptable price was RM120 per sqft whilst the asking price for Sara G was advised by the plaintiff to be RM175 per sqft and the acceptable sale price was RM150 per sqft.

[22] The plaintiff claims (in its amended SOC) that the plaintiff marketed the two parcels of land discreetly to numerous potential purchasers, amongst H others, the Cempaka Group of Schools, Bandar Raya Developments Bhd, IJM Properties Sdn Bhd, Ahmad Zaki Resources Bhd, Land Multiplex Public Ltd and Dato' Ismail Shahabuddin.

[23] Acting on the said oral estate agency appointment (as claimed in its I amended SOC instead of acting on the said marketing agency appointment as initially claimed in its SOC), the plaintiff claims that it also introduced the two parcels of land to Mayland at a meeting between representatives of Mayland, ie Tan Sri David Chiu, the vice-chairman and Mr Low Gay Teck, the Managing Director of Mayland, and Mr Sulaiman bin Mustafa and Mr Gan Eng Soon of

the plaintiff held on 29 May 2007 at the office premises of Mayland whereby Mayland requested the plaintiff to keep Mayland's interest to purchase the two parcels of land as confidential and anonymous for the time being.

[24] At the said meeting on 29 May 2007, the representatives of Mayland also requested the plaintiff to submit to Mayland the details of the two parcels of land for their consideration to purchase.

[25] The plaintiff formally introduced the two parcels of land and submitted the details of the two parcels of land and its development proposal to Mayland vide the plaintiff's letter dated 5 June 2007.

[26] Mayland acknowledged receipt of the plaintiff's letter dated 5 June 2007 and accepted its contents that should Mayland be interested in the two parcels of land, they would continue to deal through the plaintiff for further negotiations on the purchase of the two parcels of land.

[27] Mayland then requested that the plaintiff arrange for a site visit to enable Mayland to conduct a purchase analysis of the two parcels of land.

[28] On 22 June 2007, one Mr Gan Eng Soon of the plaintiff accompanied Mr Low Gay Teck, the Managing Director of Mayland and one Mr Teoh Eng Poh, Head of Sales of Country Heights Marketing Sdn Bhd on a site visit of the two parcels of land and also various unsold bungalow lots (and as claimed in its amended SOC) at CHD as CH had also appointed the plaintiff as its estate agent for the sale of the remaining unsold bungalow plots in the year 2005.

[29] Mayland remained interested in the purchase of the two parcels of land after the site visit (that was arranged by the plaintiff on 22 June 2007 as claimed in its amended SOC) and requested the plaintiff, as estate agent (as claimed in the plaintiff's amended SOC), to produce additional information on the two parcels of land, in particular, the requisition survey plan, the layout and contour plan of the two parcels of land and the whole of CHD and the concept development plan for the two parcels of land prepared by CH.

[30] Having obtained the additional information requested by Mayland from CH in a compact disc and hard copies of relevant plans, the plaintiff forwarded to Mayland on or about July 2007, the said information in the form of a compact disc, the requisition survey plan, contour and layout plan and two proposed concept development plan on the two parcels of land.

[31] Subsequently, upon being contacted and followed up by the plaintiff,

Mr Low Gay Teck, the Managing Director of Mayland informed the plaintiff that Mayland was considering various financial scenarios on the two parcels of land.

[32] Thereafter, without the knowledge of the plaintiff, CH and/or the defendant and Mayland communicated directly with each other with regard to the sale and purchase of the two parcels of land by extricating the plaintiff.

[33] On 9 August 2007, (as claimed in its amended SOC) the plaintiff learnt that Tan Sri Lee Kim Yew and Dato' CS Ong from CH and from Mr Low Gay Teck of Mayland that CH and/or the defendant and Mayland met to discuss the terms and conditions of the sale and purchase of the two parcels of land.

[34] The plaintiff claimed initially that the defendant breached the marketing agency contract between the plaintiff and CH and/or the defendant.

[35] The plaintiff, subsequently, claims (in its amended SOC) that the defendant breached the estate agency contract between the plaintiff and CH and/or the defendant by extricating the plaintiff from and not involving the plaintiff in the sale and purchase transaction of the two parcels of land.

[36] The plaintiff initially claimed that the sale and purchase of the two parcels of land between the defendant and the subsidiary and/or related companies of Mayland was done surreptitiously and in a manner to extricate the plaintiff from the plaintiff's position of marketing agent of the two parcels of land for CH and/or the defendant for successfully marketed and introduced the two parcels of land to the purchaser, Mayland and that the acts of CH and the defendant are in breach of the contractual relationship and obligations of CH and/or the defendant towards the plaintiff.

[37] The plaintiff, subsequently, claims (in its amended SOC) that the sale and purchase of the two parcels of land between the defendant and the subsidiary and/or related companies of Mayland was done surreptitiously and in a manner to extricate the plaintiff from the plaintiff's position of estate agent of the two parcels of land for CH and/or the defendant and with the intention of avoiding the payment of the plaintiff's professional fees when the plaintiff has successfully marketed and introduced the two parcels of land to, Mayland and/or its subsidiaries and that the acts of CH and the defendant are in breach of the contractual relationship and obligations of CH and/or the defendant towards the plaintiff in failing to pay the plaintiff's professional fees.

[38] The plaintiff claims (in its amended SOC) that it is entitled to be paid its professional fees as the estate agent of the two parcels of land as the plaintiff has made an effective and successful introduction for CH and/or the defendant

whereby as a result of the introduction of the two parcels of land to Mayland by and on the efforts of the plaintiff, the two parcels of land were successfully sold to Mayland and/or its subsidiaries.

[39] The plaintiff was later informed by Dato' CS Ong that the sale of the two parcels of land had been successfully concluded.

[40] The plaintiff then sent their Invoice No 00003427 dated 26 June 2008 for the sum claimed vide their letter bearing the same date being the plaintiff's professional fees (including government tax) for their services rendered to CH and/or the defendant as estate agent for the two parcels of land.

[41] Since the plaintiff were not involved in the sale and purchase transactions for the two parcels of land to the two subsidiaries of Mayland, the plaintiff calculated the sum claimed based on the price per sq foot at which the two parcels of land were sold, ie RM150 for Sara, amounting to RM36,904,032, and RM120 for Daman, amounting to RM20,908,800, which were informed orally by the plaintiff to Dato' CS Ong.

[42] Nevertheless, even though the plaintiff has successfully marketed and introduced the two parcels of land to the two fully owned subsidiaries of Mayland the defendant has failed, omitted, neglected and willfully refused to pay to the plaintiff the sum claimed which is due and owing to the plaintiff.

[43] The plaintiff, through their previous solicitors, Messrs RR Singham, sent to CH's solicitors, Messrs Lee Partnership, a letter of demand dated 26 August 2008 for the outstanding sum claimed but to date the sum claimed has not been paid.

[44] Hence, the plaintiff filed this action seeking judgment for the sum claimed together with late payment interest at the rate of 1.25% per month beginning from 27 July 2008 until date of full settlement, costs and any other or due relief that this honourable court shall deem fit.

THE DEFENDANT'S DEFENCE

[45] The defendant filed its statement of defence ('defence') on 26 June 2009, encl (8).

[46] On 23 June 2011, the defendant amended its defence ('amended defence').

[47] On 29 June 2011, the defendant filed its amended defence, encl (29).

[48] In its amended defence, the defendant has:

(a) denied that there was an oral agency contract entered into between Mr Sulaiman bin Mustafah of the plaintiff and Dato' CS Ong of CH or between Mr Sulaiman bin Mustafah of the plaintiff and Dato' CS Ong for and on behalf of the defendant for the sale of the two parcels of land and/or that pursuant to that oral agency contract the plaintiff would be paid professional fees of 2% from the sale price of the two parcels of land excluding government tax of 5%;

(b) averred that it did not appoint the plaintiff as the estate agent or the marketing agent for the sale of the two parcels of land;

(c) denied that the plaintiff acted as the defendant's estate agent at the time the plaintiff introduced the two parcels of land to Mayland;

(d) averred that at all material times it had no knowledge of the arrangements between the plaintiff and Mayland with regard to the marketing of the two parcels of land to Mayland;

(e) averred that, based on the plaintiff's averments, it appeared that the plaintiff was acting as Mayland's agent in their arrangements with Mayland concerning the two parcels of land;

(f) admitted that there was a site visit by the representatives of Mayland to the two parcels of land but averred that the two parcels of land had been open for sale long before the claim made by the plaintiff that it had been appointed as the estate agent by the defendant to market the land, that the relevant information, documents and materials concerning the two parcels of land had been given to potential purchasers, including Mayland, and estate agents for their consideration and that all the potential purchasers who were interested in the two parcels of land and the estate agents were also permitted to view the two parcels of land;

(g) averred that it is incredible that a professional estate agent like the plaintiff did not take action to guarantee its interest in its commission by signing a written agreement with its client before introducing a potential purchaser;

(h) admitted that it has sold Daman to Mayland Success Sdn Bhd and Sara to Mayland Supreme Sdn Bhd;

(i) averred that the plaintiff was never appointed as the marketing agent or the estate agent for CH for the sale of the two parcels of land and that there was no agreement whatsoever between CH or the defendant and the plaintiff in relation to the sale of the two parcels of land;

(j) admitted that CH has received the Invois No 00003427 dated 26 June 2008 for a sum of RM1,214,069.47, for the professional fees of the plaintiff and service tax thereon in relation to the sale and purchase of the

two parcels of land between CH and Mayland vide the letter bearing the same date from the plaintiff but averred that the plaintiff is not entitled to claim for the professional fees based on the sale prices of the two parcels of land as set out in the plaintiff's amended SOC;

(k) averred that CH has in its reply dated 12 July 2008 stated that it was shocked to receive the plaintiff's letter and invois dated 26 June 2008 as CH did not appoint the plaintiff in the matter and there was no agreement for the payment of the agency fee as alleged by the plaintiff or any portion of it;

(l) admitted that it has received the plaintiff's letter dated 26 August 2008 sent vide Messrs RR Singham (its previous solicitors demanding for the sum claimed) but averred that CH has denied the plaintiff's allegations contained in that letter vide the letter dated 16 September 2008 from Messrs Lee Partnership on the basis that the plaintiff was never appointed to act on CH and/or the defendant's behalf in relation to the two parcels of land;

(m) averred that it is obvious from the contents of the plaintiff's letter dated 26 August 2008 sent vide Messrs RR Singham that the plaintiff did not know who was the owner of the two parcels of land and hence it was impossible that the plaintiff could have been appointed as the agent by the defendant, Dato' CS Ong or CH;

(n) averred that the two parcels of land were sold by the defendant to Mayland Success Sdn Bhd and Mayland Supreme Sdn Bhd, respectively, and not by CH to Mayland;

(o) averred that the defendant was unaware of the plaintiff's claim until it was served the writ of summons and the SOC;

(p) denied that it is indebted to the plaintiff for the sum claimed or any part of it;

(q) averred that there is no basis whatsoever for the plaintiff to file its claim for the agency fee against the defendant; and

(r) denied the rest of the averments of the plaintiff in its amended SOC and put the plaintiff to strict proof.

THE PLAINTIFF'S FOUR WITNESSES

[49] At the trial which commenced on 7 January 2013 before me, the plaintiff called four witnesses. They are Sulaiman bin Mustafa as PW1, Danial Gan bin Abdullah (formerly known as Gan Eng Soon) ('Gan'), as PW2, Low Gay Teck ('Low') as PW3 and Rohan a/l Padmanathan ('Rohan') as PW4.

THE DEFENDANT'S TWO WITNESSES

[50] The defendant called two witnesses. They are Dato' Ong Chong Sek ('Dato' CS Ong') as DW1 and Tan Sri Lee Kin Tiong @ Lee Kim Yew ('Tan Sri Lee Kim Yew') as DW2.

THE PLAINTIFF'S CASE AT THE TRIAL

[51] However, the plaintiff's position on how and who allegedly appointed the plaintiff as an estate agent in respect of the sale of the two parcels of lands and whether there was an agreement between the parties on the estate agency fee payable to the plaintiff is not clear.

DECISION OF THE COURT

[52] On 7 March 2013, having considered the submissions of and the cases cited by both the parties against the backdrop of the evidence adduced by both parties, the court was satisfied that the plaintiff had failed to prove its claim against the defendant on a balance of probabilities.

[53] The court, consequently, dismissed the plaintiff's claim with costs of RM35,000.

[54] Being dissatisfied with the decision of the court, the plaintiff has filed a notice of appeal to the Court of Appeal against the decision of the court.

REASONS FOR THE DECISION OF THE COURT

[55] Below are the reasons why the court decided in that manner.

THE PLAINTIFF'S ORIGINAL POSITION — NO AGREEMENT ON FEE

[56] Originally, the plaintiff claimed as follows:

(a) that at or about early 2007, Country Heights Holdings Bhd ('CH') (which was the first defendant in this suit) had for and on behalf of the second defendant (Mega Palm Sdn Bhd) appointed the plaintiff as its marketing agent for the sale of the two parcels of land (see para 7 of the amended SOC which shows amendments to the original para 5); and

(b) that there was no agreement between the plaintiff and the defendants on the real estate agency fee payable to the plaintiff and that it was not necessary to negotiate or agree on the plaintiff's fee/commission as it is

already provided in the Seventh Schedule Part C(1)(a) of the Valuers, Appraisers and Estate Agents Rules 1986.

[57] In my judgment, the above position is clear from the following events:

(a) the defendant applied to strike out the plaintiff's claim vide a summons in chambers, encl (10), filed on 23 June 2009. In para 16 of 'afidavit defendan-defendan (2)' affirmed on 11 September 2009, encl (14), Dato' CS Ong deposed that there was no agreement between the plaintiff and the first defendant or the second defendant to pay the plaintiff the fee claimed by the plaintiff or any part thereof;

(b) in response, Rohan a/l Padmanathan affirmed 'afidavit jawapan plaintif (2)' on 8 October 2009, encl (15), on behalf of the plaintiff wherein he deposed at para 14 that no agreement existed between the plaintiff and the defendants as the appointment of the plaintiff was made orally by Dato' CS Ong and that the fee charged by the plaintiff is a standard fee charged by the real estate marketing agents.

Paragraph 14 reads as follows in Malay:

> Tiada perjanjian wujud antara Plaintif dan Defendan-defendan kerana perlantikan Plaintif sebagai agen pemasaran Tanah-tanah tersebut telah dibuat secara lisan oleh Dato' CS Ong. Yuran yang dikenakan oleh Plaintif adalah yuran standard yang dicaj oleh agen pemasaran bagi hartanah.

(c) in para 14 of 'afidavit jawapan plaintif (3)' affirmed on 14 December 2009, encl (17), Rohan further deposed as follows in Malay:

> Saya menegaskan yuran yang dikenakan oleh Plaintif sebanyak 2% harga jualan Tanah-tanah tersebut adalah yuran standard yang dibenarkan menurut skala fee agen hartanah di bawah Seventh Schedule Part C(1)(a)(ii) dalam 'Valuers, Appraisers and Agents Act 1981 (Act 242) & Rules'.

The Seventh Schedule Part C(1)(a)(ii) in the Valuers, Appraisers and Estate Agents Rules 1986 was referred to, relied on and exhibited as exh RP11 in his affidavit;

(d) in the plaintiff's reply submissions in respect of the striking out application, the plaintiff had submitted as follows:

> 5. Plaintiff's contention is that there exists a valid marketing agency contract. No need to agree on commission as there is a scale fee to follow.
>
> 6. There is nothing to negotiate on the fee/commission as it is based on a scale with a discretion by the estate agent to grant a maximum of 30% discount. If at all, the discount factor would be considered if the client request it. Here D1 and / or D2 did not request for it.

(e) in the defendant's affidavits and submissions in respect of the striking out application, the defendants had pointed out that the fees claimed by the plaintiff were not agreed upon and that the 2% fee charged was not a standard charge as the Seventh Schedule of the Valuers, Appraisers and Estate Agents Rules 1986 provides for a scale fee of 2.75% for the first RM500,000 and 2% on the residue over RM500,000 subject to discount of up to 30%.

THE PLAINTIFF'S SECOND POSITION — THERE IS AN ORAL AGREEMENT

[58] With the benefit of the above submissions of the defendants and perhaps realising that the plaintiff's aforesaid position was legally untenable, the plaintiff amended its position in its amended SOC as follows:

(a) That at or about early 2007, Dato' CS Ong as the Chief Executive Officer (CEO) of the Property Development Division of Country Heights Holdings Berhad ('CH') had for and on behalf of the 2nd defendant (Mega Palm Sdn Bhd) appointed the plaintiff orally as its estate agent for the sale of the two parcels of land (See paragraph 7 of the Amended Statement of Claim which shows amendments to the original paragraph 5); and

(b) It was understood and agreed orally between Dato' CS Ong from CH for and on behalf of the defendant and Encik Sulaman bin Mustafa of the plaintiff that the plaintiff's professional fees would be 2% of the sale price of the said Parcels of land, not including government tax of 5%.

[59] The plaintiff's second position is, therefore, that the plaintiff's estate agency fee of 2% on the sale price has been agreed upon by the parties through an oral agreement between Dato' CS Ong and Encik Sulaiman bin Mustafa (and not unilaterally charged by the plaintiff based on the scale fee under the Seventh Schedule Part C(1)(a)(ii) of the Valuers, Appraisers and Estate Agents Rules 1986.

THE PLAINTIFF'S THIRD POSITION — THERE IS A WRITTEN AGREEMENT

[60] At the trial, the court noted that the plaintiff's case took a surprising turn. This was because Mr Sulaiman bin Mustafa ('Sulaiman'), the deputy chairman, executive director and a major shareholder of the plaintiff, claimed that the plaintiff was appointed as an estate agent to market the two parcels of land by a letter dated 29 September 2005 and that the plaintiff's estate agency fee of 2% on the sale price of the two parcels of land was stated in item (vi) of the letter:

(a) the documentary evidence adduced is as follows: the letter dated 29

September 2005 which was issued by Dato' CS Ong on behalf of Country Heights Properties Sdn Bhd (see pp 1–2 of the agreed bundle of documents (Part A, B and C) (with a yellow cover) (encl 41) — Marked as bundle B); and

(b) Sulaiman's shareholding in the plaintiff (see p 103 of the bundle of documents (chronological order) (with a green cover) — Marked as bundle C).

[61] Sulaiman testified as follows at pp 27–28 of the notes of evidence of 7 January 2013:

Pemeriksaan Balas (Cross-Examination)

Masa: 12.24PM

LCP: En Sulaiman, in your Witness Statement you referred to a letter dated 29th September 2005 at Page 1 of the green bundle. Can I refer you to Page 1? Page 1 of the Agreed Bundle, it is the letter dated 29th September 2005. You have the document with you En. Sulaiman? Yes, the yellow bundle.

SULAIMAN: Yes Yang Arif

LCP: In your Witness Statement En Sulaiman, you referred to this letter and you said that the professional agency consultancy fee of Jones Lang Wootton was stated in Item 6 [item (vi)] of the letter which provided for consultancy fee of 2%. Are you saying En. Sulaiman that Jones Lang Wootton's 2% fee for the subject matter of this suit was stated in this letter in Item 6 [item (vi)]?

SULAIMAN: Yes Yang Arif

LCP: So are you saying that this is an appointment letter of Jones Lang Wootton in which the parties agreed a fee for Jones Lang Wootton's real estate consultancy.

SULAIMAN: Yes Yang Arif.

LCP: You are aware En. Sulaiman, that the plaintiff's claim in this suit is for real estate agency fee in respect of the sale of two parcels of land known as Taman Insara [Daman and Sara]. Are you aware?

SULAIMAN: Yes Yang Arif.

[62] The plaintiff, therefore, contradicted its own pleaded case in para 7 of the amended statement of claim that the plaintiff's estate agency fee of 2% on the sale price of the two parcels of land was agreed by the parties through on oral agreement between Dato' CS Ong and Sulaiman.

[63] Indeed, Sulaiman was adamant and insisted that the letter dated 29 September 2005 was the agreement between the plaintiff and the defendant on the plaintiff's estate agency fee of 2% on the sale price of the two parcels of land (Daman and Sara) even though the defendant's learned counsel pointed out to him that his statement is inconsistent with the contents of the letter dated 29 September 2005.

His testimony at pp 28–29 of the notes of evidence of 7 January 2013 is as follows:

> LCP: Would you agree with me that the letter that I just referred to. The letter of 29th September 2005 at Page 1. That letter has nothing to do with the two parcels of land which forms the subject matter of this suit? Do you agree?
>
> SULAIMAN: No Yang Arif. I do not.
>
> LCP: Can I refer you En. Sulaiman to the content of the letter? At the title, if I may read to expedite En. Sulaiman. At the title it is stated joint bungalow development of selected lots of Country Heights Damansara and in third paragraph, it refers to record of understanding which [reached] during the meeting to serve as a framework for joint venture investment, so this is not merely to serve as a framework for joint venture investment, so this is not merely an arrangement for sale of land. Do you agree with me?
>
> SULAIMAN: No Yang Arif I don't agree. Joint venture itself is the sale.
>
> LCP: Alright. I will go further then. Can you look at Item 1 [item (i)]? It says, this is the arrangement. This as agreed we now set out the terms of joint development of selected bungalow lots at Country Heights Damansara. Item 1 [Item (i)], Ching [Eng Ching] Holdings Sdn [Bhd] shall initially commence with the building of 5 units of bungalows at CHD, which is an abbreviation of Country Heights Damansara of Lot 236, 237, 281, 282 and 345, collectively referred to as the 5 bungalow lots. So this letter is confine to the 5 bungalows lots. Do you agree with me?
>
> SULAIMAN: No Yang Arif. I do not.
>
> LCP: I go further En. Sulaiman. Item 2. Cost of planning, designing, architect fees, constructing, completing and interior furnishing of the 5 CHD bungalow lots shall be borne by CEC Sdn Bhd SB and the construction cost for each of the bungalow is estimated to be not less than RM2.5 million. So this is not just for sale of land, do you agree with me?
>
> SULAIMAN: No I don't. It is a sale of land in the form of joint venture.
>
> LCP: Do you agree with me En. Sulaiman that this involves construction of building? Do you agree with me En. Sulaiman that the terms agreed in this letter involves construction of building?

[64] The court was of the view that based on the answers given by Sulaiman

as set out above Sulaiman's claim that the letter dated 29 September 2005 was the letter appointing the plaintiff as the estate agent in which the parties agreed (in item (vi) therein) on the plaintiff's estate agency fee of 2% on the sale price of the two parcels of land is clearly untrue.

[65] This is because it is plain and obvious from the contents of the letter dated 29 September 2005 that the letter was specifically issued by Country Heights Properties Sdn Bhd to confirm its arrangement with the plaintiff in respect of a joint development of five bungalows wherein Ching Eng Chin Holdings Sdn Bhd ('CECSB') was to carry out the construction at its own costs (constuction costs) five bungalows on the five bungalow lots owned by Country Heights Properties Sdn Bhd, ie Lot 236, Lot 237, Lot 281, Lot 282 and Lot 345 ('the five bungalow lots'). There was no mention of any other property in the letter.

[66] Furthermore, the terms in the letter dated 29 September 2005 are inconsistent with the plaintiff's claim of 2% fee/commission on the sale price of the two parcels of land as the terms on the fee/commission payable for the marketing and sale of the five CHD bungalows of the letter were as follows:

> (vii) Country Heights shall be the main leader in the business of these bungalows development, which include promoting and marketing the 5 CHD Bungalows;
>
> (viii) The Sales Commission representing one point two five percent (1.25%) of the sale price shall be paid out the proceeds of sale of each of the 5 CHD Bungalows.

[67] Under the terms of the letter dated 29 September 2005, the sales commission of 1.25% was not payable to the plaintiff. Indeed, the plaintiff did not claim to be entitled to the sales of commission of 1.25%.

[68] The plaintiff's role in the joint development of the five CHD bungalows was quite different from that of the ordinary marketing and sale role of an estate agent. The plaintiff's role in the joint development of the five CHD bungalows was as a stakeholder of the total construction costs of RM12.5m to be deposited by the CECSB (the 'contractor') and to make authorised payments therefrom. It is provided in item (iv) of the letter dated 29 September 2005 as follows:

> (iv) Before commencement of the construction, CECSB shall deposit the sum of RM12.5 million with Messrs Jones Lang Wootton, who shall hold the same as Stakeholder and apply this sum towards all authorized payments in respects of the development of the 5 CHD Bungalows.

[69] The sum of RM12.5m was the estimated total construction costs for the five CHD bungalows, estimated at RM2.5 per bungalow (see item (ii) of the letter).

[70] The court found that the plaintiff's role as a stakeholder was as follows:

(a) the plaintiff was to receive 'professional agency consultancy fees' of 2% (and not the above mentioned sales commission of 1.5%); and

(b) the plaintiff's 'professional agency consultancy fees' of 2% was to be based on the total value of the construction cost and land costs to be paid out from the sale price of each of the five bungalows sold (see item (vi) of the letter).

[71] Whereas, the plaintiff's claim in the present suit is for sales commission of 2% based on the sale price of the two parcels of vacant land.

[72] In my judgment, the terms on 2% professional agency consultancy fees cannot possibly apply to the sales of the two parcels of land for the following reasons:

(a) the sales of the two parcels of vacant land did not involve construction costs;

(b) the plaintiff does not have a role as a stakeholder or the duty to disburse payments towards construction of buildings; and

(c) the two parcels of land known as Daman (7 acres) and Sara (3.2 acres) are huge parcels of land worth over RM57m whereas the five bungalow lots were small subdivided lots worth a small fraction of the value of Daman and Sara. When the value of the property is high, it is common for the parties to negotiate and agree on a lower rate of real estate agency fee as envisaged in the Seventh Schedule of the Valuers, Appraisers and Estate Agents Rules 1986.

[73] Sulaiman subsequently contradicted himself on his claim that there was an agreement on the plaintiff's 2% professional consultancy fee when he admitted that there was no agreement between the parties on an estate agency fee. He claimed that one of the reasons that there was no agreement on the plaintiff's fee is that it was not necessary to negotiate on the fees as the 2% is already stipulated in the Seventh Schedule of the Valuers, Appraisers and Estate Agents Rules 1986.

[74] He said as follows at p 41, lines 14–34, of the notes of evidence of 7 January 2013 in answer to the questions posed to him by learned counsel for the defendant:

LCP : The plaintiff has had earlier claimed that the fees claimed by the plaintiff

were in accordance with the seventh schedule of the Valuers, Appraisers and Estate agent Rules 1986, could that be the reason why there was no agreement between the parties on an estate agency fee.

SULAIMAN : That is not the only reason.

LCP : But could that be the reason?

SULAIMAN : I don't think so.

LCP : Is that one of the reasons?

SULAIMAN : It is one of the reasons, yes.

LCP : So you are saying that because the 2% is already stipulated in the rules so there was no, not necessary to negotiate on the fees is that correct?

SULAIMAN : Yes Yang Arif.

WHETHER SULAIMAN WAS A TRUTHFUL WITNESS?

[75] In my judgment, it is apparent from Sulaiman's sworn oral testimony as reproduced above that Sulaiman was not a truthful witness and that he was prepared to tailor his testimony to suit the plaintiff's case in which he has a vested interest based on his shareholding in the plaintiff.

HOW DID THE PLAINTIFF COME TO KNOW THAT DAMAN AND SARA WERE AVAILABLE FOR SALE?

[76] How the plaintiff came to know that Daman and Sara were available for sale was explained by Dato' CS Ong during cross-examination by the plaintiff's learned counsel.

He said as follows at p 22, line 15 to p 23, line 15 of the notes of evidence of 9 January 2013:

NCD : My first question is what do you mean when you say 'feel and gauge'? What is to 'feel and gauge'?

ONG : Ok.

NCD : 'The market'. What is involved in?

ONG : Ok, you know, occasionally, I used to meet up with Sulaiman because as I said, I was from there and Jones Lang Wootton is a property consultant company and in all my history of work with Country Heights, we have never, no, we have, I must say, rarely, used a real estate agent. Rarely, because we have our own marketing and sales team and 99.9 per cent of all the sales is done in-house. But occasionally, when I meet up with Sulaiman, he will aske me, 'Do you have anything that I can help you'? I say, 'Well, I'm thinking of, you know, there are two plots of land. Why don't you just look at it? And if you have anyone interested, please let me know'. And then we will discuss. That was how

A we work in all previous deal. Usually we will just, you know, occasionally meet up, talk to each other, even on phone and then if he has anyone interested in a particular property, then he will come back to me. Either he call me or he will write a note to me and then I will say, 'Ok, this is the price, we can make an offer and this is what I will pay you'. Usually it will go to the second stage but that, when I talk, when I say, 'feel and gauge on a discreet basis', it was very preliminary. I said 'If you have anybody, please come' because we are very friendly to each other.

NCD : My question to you is this, you were speaking to Encik Sulaiman.

C ONG : Yes.

NCD : As a valuer attached to Jones Lang Wootton.

ONG : As a property consultant and as a friend.

D NCD : Property consultant.

ONG : And as a friend.

E **[77]** Sulaiman also conceded during the trial that Dato' CS Ong did inform him of the other properties which were available for sale. At p 32, lines 11–25 of the notes of evidence of 7 January 2013 he said as follows in answer to questions posed to him:

LCP : So Dato' CS. Ong did inform you of properties of Country Heights F which were available for sale at that time?

SULAIMAN : Yes Yang Arif in Damansara.

LCP : And he asked you to look up for interested buyers on discreet basis. Is that correct?

G SULAIMAN : Yes Yang Arif, on discreet basis.

LCP : When Dato' CS. Ong invited you to market properties of Country Heights Holdings, is it only limited to the two parcels or other parcels like bungalows and other lots?

H SULAIMAN : Includes other properties as well, Yang Arif.

[78] It is clear from the above that following Sulaiman's inquiry, Dato' CS Ong informed Sulaiman of the properties of the Country Heights group which were available for sale which included the two parcels of land. It was at a I preliminary stage of general disclosure of properties available for sale. Sulaiman was supposed to come back to Dato' CS Ong if he has an interested purchaser for any of the properties of Country Heights which were disclosed to him so that Sulaiman could take instruction on the sale price and the parties could agree on the plaintiff's fee.

[79] However, in respect of the sale of the two parcels of land to Mayland, the parties never got to the second stage because Sulaiman and the plaintiff did not inform Dato' CS Ong that Mayland was an interested purchaser for Daman and/or Sara.

[80] Dato' CS Ong requested that Sulaiman/the plaintiff feel and gauge the market on a discreet basis as Country Heights is a property developer and for it to sell its development land instead of developing the land on its own may create a questionable feeling in the market especially when the Country Heights group was still selling bungalow lots next to the two parcels of land.

His testimony appears at p 8, lines 7–26 of the notes of evidence of 9 January 2013.

Did the plaintiff inform Dato' CS about Mayland's interest?

[81] According to the plaintiff, the plaintiff did not inform Dato' CS Ong and Tan Sri Lee Kim Yew that Mayland was interested to purchase the two parcels of land. The reason is that they were requested by Mayland not to disclose its intention to purchase the properties from the defendant.

At p 44, line 22 to p 45, line 12 of the notes of evidence of 7 January 2013, Sulaiman said as follows in answer to questions posed to him:

> LCP : Encik Sulaiman it is the plaintiff's case that the plaintiff was requested by Mayland or Malaysia Land Properties Sdn. Bhd. not to disclose the intention to purchase the land from the defendant, is that correct?
>
> SULAIMAN : Yes Yang Arif.
>
> LCP : And it also the plaintiff's case that the plaintiff duly adhered to the request of Mayland to keep the intention to purchase private and confidential.
>
> SULAIMAN : Yes Yang Arif.
>
> LCP : Or in your own words, to keep it anonymous. Is that correct?
>
> YA : Can you please answer the question.
>
> SULAIMAN : Yes Yang Arif.
>
> LCP : Is that the reason why the plaintiff did not disclose the identity of Mayland to Dato' C.S. Ong and Tan Sri Lee of Country Heights Holding?
>
> SULAIMAN : That is no correct.
>
> LCP : Now I asking you is that the reason why the plaintiff did not disclose the identity of Mayland to Dato' C.S. Ong and Tan Sri Lee?
>
> SULAIMAN : Yes Yang Arif.

[82] The fact that the identity of Mayland was withheld from the defendant was also admitted by the plaintiff in its letter to Country Heights Holdings Bhd dated 19 September 2007 (at pp 88–89 of bundle B) wherein the plaintiff stated at p 89, paras 2–3 as follows:

> Our understanding of the meeting between Tan Sri David Chiu and Mr Low Gay Teck of Malaysia Properties Sdn. Bhd. (Mayland) on 29th May 2007 with our Encik Sulaiman Mustafa and Mr Gan Eng Soon was that we were to treat Mayland's intent to acquire the development land as strictly confidential.
>
> As professionals we adhered to the requests to keep matters discreet and confidential for you as well as for Mayland.

[83] The same was confirmed by Rohan a/l Padmanathan ('Rohan'), an executive director for the plaintiff, who was called as the plaintiff's fourth witness ('PW4').

At p 48, line 28 to p 49, line 1 of the notes of evidence of 8 January 2013, Rohan said as follows in answer to questions posed to him:

> LCP : So my last question that time Rohan is that the plaintiff was requested by Mayland not to disclose their intention to purchase the land from the defendant and you said yes you were informed. And the plaintiff adhered to Mayland's request not to disclose that?
>
> ROHAN : Yes.
>
> LCP : And that's the reason that the plaintiff did not disclose the identity of Mayland, yes?
>
> ROHAN : Yes.

[84] Even, the plaintiff's alleged internal notes of meeting supports the defendant's position that Dato' CS Ong was not aware of the plaintiff's role in marketing the two parcels of land to Mayland.

At p 49, lines 3–16 of the notes of evidence of 8 January 2013, Rohan said as follows in answer to questions posed to him:

> LCP : Can I refer page 100 of the same bundle? Paragraph 7 it reads CS which has been, it's an abbreviation for for Dato' CS Ong added that Jones Lang Wootton should inform him as a client of any introduction and disclose of potential purchaser details. In this instance it would very hard for him to justify to Tan Sri Lee as Tan Sri Lee might claim that he introduce this property to Tan Sri David Chiu earlier. Can you confirm this is what Dato' CS Ong told you?
>
> ROHAN : Yes this is what Dato' CS Ong told me.

LCP : Can you confirm that there is nothing in this notes of evidence disputing this statement of Dato' CS Ong? A

ROHAN : I confirm.

[85] The same was confirmed by Gan, an assistant vice president of the plaintiff at the material time, who was called as the plaintiff's second witness ('PW2'). B

At p 78, lines 5–30 of the notes of evidence of 8 January 2013, Gan said as follows in answer to questions posed to him: C

LCP : I hope to just complete it today, Yang Arif. Mr. Gan, the plaintiff Jones Lang Wootton was requested by Mayland to keep their interests in the two parcels of land Daman and Sara anonymous and confidential. Did the plaintiff adherer to this request?

GAN : Yes. D

LCP : Is that why the identity of Mayland was not disclosed to Datuk CS Ong?

GAN : Yes I have it.

LCP : Can you refer to paragraph 7?

GAN : Yes. E

LCP : This fact that Datuk CS Ong did not know about the identity of Mayland as a party introduced was also mentioned in the minutes prepared by Mr. Rohan Pathmanathan at paragraph 7, is that correct?

GAN : Yes. F

[86] Under cross-examination, Gan admitted that he did not reveal the identity of Mayland to Dato' CS Ong.

At p 79, lines 7–25 of the notes of evidence of 8 January 2013, Gan said as follows in answer to questions posed to him: G

LCP : And in view of the request of Mayland to keep their interest confidential, this request for information was made on a general basis?

GAN : Not general basis. We actually informed Datuk CS Ong that we have a very keen potential purchaser which the identity will be revealed. H

LCP : Ok, that will do.

GAN : Yes, especially during site visit.

LCP : [You] inform Datuk CS Ong that the identity will be revealed during site visit? I

GAN : Yes because.

LCP : Ok, that will do.

GAN : The buyer will be present.

[87] The court noted that one Teoh Eng Poh, a former staff of Country Heights Marketing Sdn Bhd, who was allegedly present during the site visit arranged by the plaintiff for Low of Mayland to view the two parcels of land and other properties of the Country Heights group was not called as a witness even though he was listed as one of the plaintiff's witnesses in the list of the plaintiff's witnesses.

[88] It is, therefore, clear from the above that Dato' CS Ong and Tan Sri Lee Kim Yew were not informed of the plaintiff's dealing with the representative of Mayland with regard to Mayland's interest in the two parcels of land.

WERE MAYLAND AND THE DEFENDANT ALREADY IN DISCUSSION PRIOR TO THE PLAINTIFF'S ALLEGED INVOLVEMENT?

[89] During cross-examination, the plaintiff's third witnesses ('PW3'), namely, Mr Low Gay Teck, the Managing Director of Mayland at the material time, ('Low') disclosed the sequence of events relating to his dealings with the plaintiff on the two parcels of land.

At p 22, line 31 to p 23, line 20 of the notes of evidence of 8 January 2013, Low said as follows in answer to questions posed to him:

LCP : Yes. Mr Low, can you describe or explain the sequence of events in your dealings on this matter with Jones Lang Wootton and Tan Sri David Chiu?

LOW : Jones Lang, as mentioned earlier, Jones Lang introduced these two parcels of land to me. I've conducted the site visit together with Jones Lang's rep and some other parties which I cant remember their names. And post the site visit I would have requested some additional information pertaining to the land and then, of course I would, subsequent to that I would carry out my own feasibility studies and then I will meet up Tan Sri David Chiu who is the owner of the company to discuss on whether the company should proceed to acquire this parcel of land. When I met up with Tan Sri David, you know which we usually do for any new land acquisition, when I mentioned to him that these two parcels of land and he was saying that, 'Yes, I am [aware], is this Tan Sri Lee's land?' I said yes: he said, 'Tan Sri Lee did talk to me about it.' And that's it. Full stop. Because I don't question him as to what transpired. So our post discussion would be, so what are we doing? Is this land worth pursuing? And we went on to discuss on the project viability with respect to these two parcels of land. That would be my answer.

LCP : Ok. So it means that, from what you said, it would mean that by the time you mentioned Tan Sri David Chiu of these two parcels of land, Tan Sri Davit Cho was already aware of these two parcels of land.

LOW : Yes. He said Tan Sri Lee did talk to him and that's full stop. Yes.

[90] Low further clarified that the person who had spoken to Tan Sri David Chiu of Mayland was Tan Sri Lee Kim Yew of Country Heights. His testimony to this effect appears at p 23, line 22 to p, 24 line 9 of the notes of evidence of 8 January 2013).

[91] The above chronology of events was agreed to and accepted as accurate by the plaintiff in its written submissions (see paras 49–51 at pp 29–31 of the plaintiff's written submissions).

[92] The above chronology of events may be summarised as follows:

(a) the plaintiff (Jones Lang Wootton) introduced the two parcels of land to Low, the Managing Director of Mayland;

(b) Low conducted a site visit together with the plaintiff's representative and some other parties (whose names he could not remember);

(c) after the site visit, he requested some additional information pertaining to the land;

(d) Low then carried out his own feasibility studies;

(e) subsequent to that he met up with Tan Sri David Chiu (whom he described as the owner of Mayland) to discuss on whether the company should proceed to acquire the land;

(f) at this meeting, when Low mentioned the two parcels of land to Tan Sri David Chiu, Tan Sri David Chiu informed Low that he was aware of the two parcels of land and that Tan Sri Lee Kim Yew of Country Heights had spoken to him about the matter; and

(g) thereafter, Low discussed the project viability of the two parcels of land with Tan Sri David Chiu.

[93] The above evidence of Low ties in with the evidence of Tan Sri Lee Kim Yew ('DW2') that he was the person who introduced the two parcels of land to Tan Sri David Chiu, the Vice-Chairman of Mayland (whom he knew) at a meeting they had. Thereafter, Tan Sri Lee introduced Dato' CS Ong to Tan Sri David Chiu who requested Dato' CS Ong to liaise with Low to discuss the sale of the land (see answer to question 3 of the witness statement (D21) of Tan Sri Lee Kim Yew (DW2)).

A WHETHER THE COURT OUGHT TO DRAW AN ADVERSE INFERENCE AGAINST THE PLAINTIFF PURSUANT TO S 114(G) OF THE EVIDENCE ACT 1950 FOR NOT CALLING TAN SRI DAVID CHIU AND TEOH ENG POH AS WITNESSES?

B

[94] Tan Sri David Chiu was listed as one of the plaintiff's witnesses in the plaintiff's list of the witnesses but he was not called by the plaintiff as a witness to rebut the evidence of Tan Sri Lee Kim Yew and Low Gay Teck. The plaintiff claimed that Tan Sri David Chiu was abroad but did not request for an C adjournment of the trial date for the purpose of calling Tan Sri David Chiu.

[95] The plaintiff has claimed that Teoh Eng Poh, a former staff of Country Heights Marketing Sdn Bhd, was present during a site visit arranged by the plaintiff for Low of Mayland to view the two parcels of land and other D properties of the Country Heights group. Teoh Eng Poh was listed as one of the plaintiff's witnesses in the plaintiff's list of the witnesses but he was also not called by the plaintiff as a witness. No reason was given by the plaintiff for making the decision not to call Teoh Eng Poh at the last minute.

E **[96]** The court, therefore, accepted the defendant's submissions that it is proper in the circumstances to invoke an adverse inference against the plaintiff pursuant to s 114(g) of the Evidence Act 1950, that if Tan Sri David Chiu and Teoh Eng Poh had been called, their evidence would be unfavourable to the plaintiff in that they would confirm the defendant's position.

F

[97] As Tan Sri Lee Kim Yew and Dato' CS Ong were not even aware of the plaintiff's involvement in marketing the two parcels of land to Mayland, they did not involve the plaintiff in their negotiations for the sale of the two parcels of land to the subsidiaries of Mayland.

G

WHETHER THERE WAS A VALID APPOINTMENT OF THE PLAINTIFF AS THE ESTATE AGENT IN RESPECT OF THE SALE OF THE TWO PARCELS OF LAND TO MAYLAND'S TWO H SUBSIDIARIES?

[98] The court found that there was no positive evidence to show that there as a valid appointment of the plaintiff as an estate agent in respect of the sale of the two parcels of land to Mayland and/or the two subsidiaries of Mayland. I The evidence before the court disclosed that the only arrangement between the plaintiff and the defendant was for Sulaiman to revert to Dato' CS Ong if he (Sulaiman) had an interested purchaser in respect of any of the properties of the Country Heights Group of Companies in order to take instruction from the defendant on the sale price and to agree on the plaintiff's fee.

[99] However, Sulaiman and/or the plaintiff did not revert to Dato' CS Ong for instructions on the sale price of the two parcels of land and there was no agreement whatsoever arrived at between them on the fees payable to the plaintiff in respect of the sale, if successful, of the two parcels of land.

WHETHER THE PLAINTIFF WAS THE EFFECTIVE CAUSE OF THE SALE OF THE TWO PARCELS OF LAND TO MAYLAND'S AND/OR ITS TWO SUBSIDIARIES?

[100] In my judgment, this issue ought to be answered in the negative because based on the evidence before the court I was satisfied that the person who introduced the two parcels of land to Mayland was Tan Sri Lee Kim Yew and not Sulaiman and/or the plaintiff.

[101] At the time the sale of the two parcels of land was concluded between the defendant and Mayland's two subsidiaries, Tan Sri Lee Kim Yew and Dato' CS Ong were not even aware of any dealings between the plaintiff and Mayland.

[102] All negotiations leading to the sale of the two parcels of land were between Tan Sri Lee Kim Yew and Dato' CS Ong on behalf of the defendant and Tan Sri David Chiu and Low Gay Teck on behalf of the subsidiaries of Mayland.

[103] By the plaintiff's own admission, they were not involved in the negotiations leading to the sale of the two parcels of land to Mayland's two subsidiaries.

At p 54, lines 17–29 of the notes of evidence of 7 January 2013, Sulaiman said as follows in answer to questions posed to him:

> LCP : Jones Long Wootton was not involved in the negotiation with Mayland on the sale price, do you agree?
>
> SULAIMAN : No Yang Arif.
>
> YA : What do you mean by no?
>
> SULAIMAN : No we are not involved in the negotiation on the sale price.
>
> YA : You were not involved in the negotiation on the sale price?
>
> SULAIMAN : We were not involved in the negotiation on the sale price with Mayland Properties.

[104] Hence, the evidence adduced by the plaintiff showed that all that the plaintiff had done was to provide information and arrange for the site visit to the two parcels of land for Low of Mayland.

[105] It is crystal clear that the plaintiff did not secure any offer to purchase the two parcels of land from Mayland and/or its two subsidiaries at all. This was admitted by two of the plaintiff's witnesses, namely, Sulaiman ('PW1') and Rohan ('PW4') during their cross-examination.

Sulaiman (PW1) said as follows at p 53, lines 29–34 of the notes of evidence of 7 January 2013:

> LCP : In respect of the sale of the 2 parcels of property, Encik Sulaiman, the plaintiff did not obtain any offer to purchase from Mayland, is that correct? There was no offer to purchase from Mayland through the plaintiff.
>
> SULAIMAN : Not through us Yang Arif.

Rohan (PW4) said as follows at p 50, lines 21–25 of the notes of evidence of 8 January 2013:

> LCP : Do you agree that Jones Wootton was not involved in getting an offer to purchase from Mayland? Do you agree that you did not obtain an offer to purchase from Maryland?
>
> SULAIMAN : I agree we did not obtain an offer from Mayland.

[106] The plaintiff also did not take any instruction from Dato' CS Ong on the sale price that the defendant was prepared to sell the two parcels of land to Mayland and/or its subsidiaries or to forward any advisory offer price to Mayland.

[107] In the circumstances, the court found that the plaintiff could not possibly be the effective cause of the sale of the two parcels of land to the two subsidiaries of Mayland.

THE LAW

[108] In my judgment, the law requires the plaintiff who is suing a defendant for an estate agency fee or commission to prove on a balance of probabilities two elements before its claim can succeed. The first element is that there is a valid, binding and enforceable contractual or agency relationship between them. The second element is that the plaintiff's efforts constituted the effective cause of the successful sale of the property.

[109] In the Singapore High Court case of *Colliers International (Singapore) Pte Ltd v Senkee Logistics Pte Ltd* [2007] 2 SLR (R) 230, Lai Siu Chiu J made the following observations at p 245:

> Accordingly, to succeed in any claim for any agency fees or commission (as is the case here), the plaintiff, as the purported agent, must show two things, namely, an agency or contractual relationship between itself and the defendant and, second, in the absence of any contrary term, that it was the 'effective cause' of the sale.

Therefore, it is clear that the first hurdle that the plaintiff will have to cross in order to establish its claim against the defendant is to show the existence of a valid and binding contract of agency between itself and the defendant.

[110] On the facts of the present case as highlighted above, the court accepted the defendant's submission that the plaintiff has failed to establish that there is a valid and binding contract of agency between the plaintiff and the defendant in respect of the sale of the two parcels of land.

[111] The court noted that Dato' CS Ong had only informed Sulaiman of the properties of the Country Heights Group of Companies which were available upon the enquiry of Sulaiman and the understanding was for Sulaiman to revert to Dato' CS Ong if he had an interested purchaser for any of the properties of the Country Heights group. The parties had not spoken about the plaintiff's remuneration/fee, let alone reach *consensus ad idem* on the issue of fee.

[112] The learned judge in *Colliers International (Singapore) Pte Ltd v Senkee Logistics Pte Ltd*, held that no valid estate agency contract existed between the parties. He, consequently, dismissed the plaintiff's claim.

At pp 247–249 he made the following observations which are relevant and helpful for my decision in the instant case:

> [56] … As such, it was a necessary corollary of the plaintiff's argument that it must show that an enforceable bargain had been struck notwithstanding the lack of agreement on price. In that context, *whilst it is an immutable principle that the absence of agreement on price is, in and of itself, not an insurmountable impediment to the formation of a contract, the most natural inference one has to draw from the lack of an agreement on price on the facts here is that the parties objectively did not intend to be bound until they had agreed on the precise quantum of remuneration,* (p 247).
>
> [59] Indeed, on the facts itself, *I would go even further to find that the plaintiff was, in the circumstances, itself acutely aware that there was no binding agreement between the parties at law. It was for that reason that the plaintiff placed continued emphasis on the discussion of commission as highlighted in paras 15–16 of it's statement of claim.* Such dogged insistence, in my view, does not support the argument that the plaintiff subjectively believed that a contract existed between the parties — instead, to the contrary, it is a reflection of cognisance on the part of the plaintiff that the parties had yet

to agree on a fundamental term of the contract and that, absent such agreement, no contract would have existed between the parties. In this connection, *it did not escape my attention that when Ng was in CBRE, he had taken the precaution to ensure the execution of the agency agreement.*

[60] In any event, even if we assume that the plaintiff was indeed subjectively of the view that there was a contract *inter se* (although I stress that my actual finding is that the plaintiff knew that the parties had yet to come to an agreement), *there was nonetheless clearly no consensus ad idem between the parties that could form the basis of a contract. It is a trite and an established principle of contract law that an objective test will be applied to determine whether an agreement has been reached between any two prospective contracting parties and that, accordingly, the parties' subjective belief, ipso facto, is irrelevant unless it assists in ascertaining the objective understanding between them:* see, for example, *Projection Pte Ltd v The Tai Ping Insurance Co Ltd* [2001] 1 SLR(R) 789 at [15]. *As such, even if one prospective party was of the subjective view that a contract had been concluded inter partes, if, on an objective analysis, no such contract was in existence, there would be, in law, no concluded agreement and either side would be free to walk completely unfettered by any previous negotiations*, (pp 248–249).

(Emphasis added.)

[113] The circumstances which I found in the present case are similar to those in the above case and they are as follows:

(a) there was no agreement/*consensus ad idem* between the plaintiff and the defendant that could form the basis of a contract;

(b) the plaintiff actually must have been aware that there was no binding contract between the parties at law and for that reason amended its SOC to state in para 10 of the amended SOC that there was an oral agreement between Dato' CS Ong and Sulaiman on the plaintiff's fee of 2% (a statement which Sulaiman himself later contradicted in his testimony at the trial);

(c) on the plaintiff's contention that the plaintiff's fee was orally agreed upon, it is pertinent to note that the plaintiff was careful to confirm in writing its agreed agency commission of 2% of the sale price plus 5% service tax in respect of the sale of Lot 135 in Country Heights Kajang even though the value of the property was only approximately RM2.3m and the plaintiff's commission was less than RM50,000 (see the plaintiff's letters dated 23 May 2007 and 13 June 2007 to Country Heights Holdings Bhd for the attention of Dato' CS Ong at pp 1–4 of bundle D). Dato' CS Ong did also confirm in writing the fees payable to the plaintiff in respect of the five bungalow lots at Country Heights Damansara in the letter dated 29 September 2005 (at pp 1–2 of bundle B);

(d) Sulaiman's statement that with regard to the plaintiff's agency fee, all dealings with the Country Heights Group of Companies were done based on verbal arrangement and mutual trust is clearly untrue (see notes of evidence of 7 January 2012 at p 57, lines 23–32); and

(e) indeed, it is the plaintiff's legal obligation as a registered estate agent to ensure that financial obligations and commitments regarding real estate transactions are in writing.

[114] Rule 92(1) of the Valuers, Appraisers and Estate Agents Rules 1986 made pursuant to the Valuers, Appraisers and Estate Agents Act 1981 (Act 242) provides as follows:

> A registered estate agent shall, for the protection of all parties, see that financial obligations and commitments regarding real estate transactions are in writing expressing the exact agreement of the parties and a copy of each such agreement shall be furnished to each party upon signing such agreement.

Therefore, it is clear that although the r 92(1) has specifically required the plaintiff, who is undisputedly, a registered estate agent, to ensure that, for the protection of all parties, financial obligations and commitments regarding real estate transactions are in writing expressing the exact agreement of the parties and a copy of such an agreement is furnished to each party upon the signing of the agreement, has chosen to blatantly ignore the clear provisions of the rule in the instant case involving two huge parcels of land of substantial value. The only reasonable and irresistible inference to be drawn by the court was that there never existed at any point in time an estate agency relationship between the plaintiff and the defendant as claimed by the plaintiff. It is extremely unlikely that the plaintiff would not have signed an agency contract if there was indeed such an agency contract entered into by the plaintiff and the defendant.

[115] Section 30 of the Contracts Act 1950 provides as follows:

> Agreements void for uncertainty
>
> *Agreements*, the meaning of *which is not certain*, or capable or being made certain, are void.
>
> ILLUSTRATIONS
>
> …
>
> (f) A agrees to sell to B 'my white horse for ringgit five hundred or ringgit one thousand'. *There is nothing to show which of the two prices was to be given. The agreement is void.*
>
> (Emphasis added.)

Based on the evidence before the court, the court is of the view that by virtue

of s 30 of the Contracts Act 1950, no valid agency contract existed between the plaintiff and the defendant because the terms of the alleged oral agency contract relied upon by the plaintiff were vague, uncertain and were incapable of being made certain.

WHETHER THE LAW REQUIRES THAT THE AGENT MUST BE THE EFFECTIVE CAUSE OF THE SALE?

[116] In my judgment, based on my understanding of the applicable law in the decided cases, the plaintiff must establish that the agent was the effective cause of the sale.

[117] Therefore, even if it can be assumed for a moment that there is a valid contract between the plaintiff and the defendant on the plaintiff's appointment as an estate agent for marketing the two parcels of land to the Mayland Group of Companies, nevertheless, based on the evidence before the court, the court found that the plaintiff was not the effective cause of the sale of the two parcels of land to the two subsidiaries of Mayland.

[118] In *Chew Teng Cheong & Anor v Pang Choon Kong* [1981] 1 MLJ 298; [1983] CLJ (Rep) 86, the Federal Court observed as follows at p 298 (MLJ); p 87 (CLJ):

> The law to be applied is therefore the law of estate agents. Where the agency contract provides that the agent earns his remuneration upon bringing about a certain transaction, he will be entitled to such remuneration if he is the effective, not necessarily the immediate cause of the transaction being brought about. Whether there is a sufficient connection between his act and the ultimate transaction must be ascertained from the facts of the case. 'The effectiveness of the agent's work is a matter of inference from the evidence' per McGregor J in *Sushames v Cumming* [1962] NZLR 920 at p 925. Where the agent can show that some act of his was the cause causans of the transaction (*Tribe v Taylor* [1876] 1 CPD 505 , 510) or was an efficient cause of the sale (*Miller v Radford* (1903) 19 TLR 575), he is entitled to his agreed remuneration.

[119] In the Singapore Court of Appeal case of *Deans Property Pte Ltd v Land Estates Apartments Pte Ltd and another* [1994] 3 SLR (R) 804, the court held as follows at pp 811–812:

> 17. It is clear that the relationship between an agent and a principal is a contractual one with any entitlement to commission being governed by the terms of that contract. However, an agency relationship is sometimes established in a situation where there has been little or no express discussion of contractual terms. The relationship between a vendor and a real estate agent is often of such a character. In such a case, *the agent's entitlement to any*

commission for the sale of property is dependant on his being the 'effective cause' of the sale; this being an implied term of the agency contract. The law in this respect was stated concisely by Chan Sek Keong J (as he then was) in *Ong Kee Ming v Quek Yong Kang* [1991] 1 SLR (R) at [13]:

> The law is not in dispute. In the absence of any special contractual terms, the general principle is that the agent must be the effective cause of the sale. It is a question of fact in each case …

18. In the present case, there were no express contractual terms governing the entitlement to commission. Therefore, for the appellants to succeed, they have to show that they were the effective cause of the sale. This means that their efforts to market the property must have operated to produce a ready and willing buyer for the property. *In this respect, the cases are clear that it is insufficient for the appellants to show that the sale and purchase would not have taken place but for their efforts. It is not enough for the agent's labours to be a causa sine qua non. His services must actually be the cause causans of the sale before commission is payable:* see *Millar, Son, and Co v Radford* (1903) 19 TLR 575 and *Travis v Coates* (1912) 5 DLR 807.

(Emphasis added.)

[120] In *Colliers International (Singapore) Pte Ltd v Senkee Logistics Pte Ltd*, the court held as follows at pp 251–252:

> 70 In considering this matter, I noted, at the outset, that there were no express contractual terms that dealt with the plaintiff's purported entitlement to commission under the contract. Accordingly, as highlighted in *Bowstead and Reynolds on Agency* (Sweet & Maxwell, (18th Ed), 2006) at para 7-027, remuneration would be dependent upon the satisfaction of the following principle:
>
> > Subject to any special terms or indications in the contract of agency, where the remuneration of an agent is a commission on a transaction to be brought about, he is not entitled to such commission unless his services were the effective cause of the transaction being brought about.

[121] In my judgment, an agent's right to commission does not arise out of the mere fact that the agent has introduced a purchaser as being a *cause sine qua non*. The plaintiff must go further and show that the introduction was an efficient cause in bringing about the sale of the property, ie the *cause causan* for the sale of the property. In *Emporium Holdings (Singapore) Pte Ltd v Knight Frank Cheong Hock Chye & Baillieu (Property Consultants) Pte Ltd* [1994] SGCA 147 the Singapore Court of Appeal observed as follows at p 5:

> 22. No precise definition of 'effective cause' had been attempted in any of the authorities cited to us. Indeed, it would not be possible or desirable to attempt a precise definition. Much will depend on the facts of each case and the cases on the

topic can only serve as illustrations on their particular facts. In our view, the words of Barwick CJ quoted by the learned trial judge, namely: 'The most common way of performing the agent's task is to introduce to the principal a person who becomes the purchaser under a binding contract of sale. In terms of causation the agent has thus been an effective cause of the sale' is, with respect, couched in too wide a language. In *Millar, Son & Co v Radford* (1903) 19 TLR 575, The Court of Appeal by Collins MR said:

> *It was, therefore, important to point out that the right to commission did not arise out of the mere fact that agents had introduced a tenant or a purchaser. It was not sufficient to show that the introduction as a cause sine qua non. It was necessary to show that the introduction was an efficient cause in bringing about the letter or the sale.*

[122] In *Ng Yun Yun v Chin Fook Ching* [2010] 1 LNS 605 at pp 6–7 (authority 8 in DBA), Hadhariah Syed Ismail JC held than an agent's act of bringing a potential purchaser to view the property twice was insufficient to constitute an effective cause of the sale and that the agent must show that it was through her effort that the sale was concluded. The court observed as follows:

> The crucial question to ask here is what is the effective cause for the sale of the property? Is it because of the two viewings arranged by the respondent? Or was it due to the effort of the appellant herself?
>
> Upon perusal of the appeal record, I find that *the only effort made by the respondent in trying to sell the property was bringing in Adrienne to view the property twice. Apart from that, the respondent did not obtain any offer letter or earnest money from Adrienne to secure the sale. She also did not negotiate the selling price with Adrienne.* In fact after the viewing, *Adrienne did not confirm with the respondent whether she wanted to buy the property or not.* Instead, Adrienne continued looking for other properties by checking out advertisements in the newspaper. That is when the advertisement put up by the appellant caught her eyes. After the exchanging of phone calls, both the appellant and Adrienne met for the second time. Only after this intervening event, Adrienne and the appellant negotiated the purchase price without the assistance of the respondent and the sale was concluded at a price of RM3.23m.
>
> … If the act of 'showing the property' is to be the *determining factor* here, it would *cause grave injustice to the property owner* should the *owner engage more than one estate agent* and all of them invariably had to bring the potential buyer to view the property. Then all the estate agents would be entitled to be paid a commission. *That is why I think there must be more than the act of showing the property. The estate agent must show that it was through her efforts, the sale was concluded. In this case, the respondent kept on harping that she was entitled to be paid a commission simply because she brought Adrienne to view the property. Under the law, this ground alone is not sufficient to satisfy the test of her service as the cause causans for the sale.*
>
> (Emphasis added.)

[123] Against the backdrop of the authorities cited above by the learned

defendant's counsel, the court agreed with the defendant's submission that the plaintiff was not the effective cause of the sale of the two parcels of land to subsidiaries of Mayland for the following reasons:

(a) it is clear from the sequence of events described by Low (which the plaintiff agreed and accepted as accurate (in paras 49–51 at pp 29–31 of the plaintiff's written submissions) that Tan Sri Lee Kim Yew had already discussed with Tan Sri David Chiu on the sale of the parcels of land to the Mayland group prior to Tan Sri David Chiu's meeting with Low wherein the plaintiff's communications with Low were disclosed to Tan Sri David Chiu. Therefore, the defendant has successfully established that Tan Sri Lee Kim Yew was the introducer and not the plaintiff;

(b) Tan Sri Lee Kim Yew and Dato' CS Ong of the Country Heights Group of Companies were not informed by the plaintiff of its involvement in the matter until after the deal had been concluded between the defendant and the Mayland group. That is why the plaintiff was not involved in the negotiation on the sale price and terms of the sale with Mayland; and

(c) in fact the plaintiff intentionally withheld the identity of Mayland and did not disclose Mayland's interest in the two parcels of land to Dato' CS Ong and Tan Sri Lee Kim Yew because Mayland had requested that their interest in the two parcels of land be kept private and confidential.

[124] With respect, the court was of the view that the case of *Tang Chiok Sing v Lian Fatt Sawmill Co* [1976] 2 MLJ 241 cited by the plaintiff's learned counsel is inapplicable to the instant case as it is not a case relating to a claim for estate agency fee in respect of the sale of real property. It concerns a written agreement with an agent for the payment of commission for getting a Korean concern to enter into a contract for the extraction of timber. Hence, the facts and issues in that case are very different from the facts and issues in the present case.

[125] With regard to the plaintiff's submission that 2% represents the accepted practice or norm in reliance on the case of *Tong Lee Hua v Yong Kah Chin* [1979] 1 MLJ 233 which was upheld on appeal, the learned defendant's counsel had drawn the court's attention to the subsequent Supreme Court decision in *Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd* [1986] 2 MLJ 30 wherein the Supreme Court held that whether an agent or broker is entitled to any commission depends on the agreement between the parties to be proved by positive evidence because it has not been repeatedly recognised by the courts in this country, superior or otherwise that there exists a custom that a real estate agent is entitled to a commission of the purchase price and that the commission is 2% thereof as it has not developed into a recognised custom or usage as to entitle it to be judicially noticed.

At p 32, the Supreme Court said as follows:

> Turning back to the present appeal, except for the Federal Court case of *Tong Lee Hua v Yong Kah Chin* [1979] 1 MLJ 233 which was upheld on appeal by the Privy Council, [1981] 2 MLJ 1 PC we do not think that it has been repeatedly recognised by the courts in this country, superior or otherwise that there exists a custom that a real estate agent is entitled to a commission of the purchase price and that the commission is at 2% thereof. … In our considered judgment it has not developed into a recognised custom or usage as to entitle it to be judicially noticed. Whether an agent or broker is entitled to any commission depends on the agreement between the parties and has to be proved by positive evidence. *Chew Teng Cheong & Anor v Pang Choon Kong* [1981] 1 MLJ 298 and *Tang Chiok Sing v Lian Fatt Saw Mill Co* [1976] 2 MLJ 241, both decided by the Federal Court are two good examples.

[126] The court, therefore, accepted the defendant's submission that the plaintiff's submission that the agency commission of 2% claimed by the plaintiff is customary having regard to previous transactions at pp 1–4 of bundle B is misplaced for the following reasons:

(a) the sales commission for the transaction at pp 1–2 of bundle B was 1.25% and not 2%; and

(b) the sales commission for the transaction at pp 3–4 of bundle B was in respect of a transaction which is substantially smaller in value than the value of the two parcels of land in the instant case.

[127] In para 59 of the plaintiff written submissions, the plaintiff has submitted that the following documents in bundle B having been marked as court exhibits without any objection taken thereto and must, therefore, be deemed as being conclusive as to the authenticity and contents thereof:

(a) pp 86–87 — exh P4;

(b) p 91 — exh P8;

(c) p 93 — exh P19; and

(d) pp 102–103 — exh P9.

[128] Nevertheless, the court accepted the defendant's submission that the above submission of the plaintiff is misconceived for the following reasons:

(a) the plaintiff's letter dated 30 August 2007 at pp 86–87 is placed in Part B of bundle B (ie truth of content disputed) and it's contents have been disputed by Dato' CS Ong in his letter in reply dated 5 September 2007 at pp 77–78 of bundle B which has been marked exh P2. It has also been addressed in the witness statement of Dato' Ong Chong Sek in his answer to question 7;

(b) the plaintiff's letter dated 26 June 2008 at p 91 is placed in Part B of bundle B (ie truth of content disputed) and it's contents have been

disputed by Dato' CS Ong in his letter in reply dated 12 July 2008 at p 81 of bundle B which has been marked exh D13. It has also been addressed in the witness statement of Dato' Ong Chong Sek in his answer to question 10;

(c) the plaintiff's letter dated 17 July 2008 at p 93 is placed in Part B of bundle B (ie truth of content disputed) and its contents have been disputed by Dato' CS Ong in his letter in reply dated 17 July 2008 at p 82 of bundle B which has been marked exh D11. It has also been addressed in the witness statement of Dato' CS Ong in his answer to question 10; and

(d) the plaintiff's letter dated 20 November 2007 at pp 102–103 is placed in Part C of bundle B (ie authenticity and truth of content disputed) and its contents have been disputed by Dato' CS Ong and addressed in his answer to question 9 in his witness statement (D18).

[129] If the mere marking of exhibits confirms the truth of their contents then all of the defendant's letters in reply which (were also marked as exhibits without objection) would also have to be taken as true as to their contents even though the contents of the letters from each party are contradictory.

[130] The court is of the respectful view that the case of *Desa Samudra Sdn Bhd v Bandar Teknik Sdn Bhd & Ors* [2012] 1 MLJ 729 cited by the plaintiff is not an authority in support of the plaintiff's proposition because the facts of the case did not concern an agency or brokerage claim.

[131] In paras 61–67 of the plaintiff's written submissions, the plaintiff referred to the plaintiff's internal notes of meeting prepared by Rohan at pp 100–101 of bundle B. however, the plaintiff's notes of meeting were not admitted as evidence as they were only marked as ID 17 for identification purpose. Rohan conceded that the plaintiff's notes of meeting were not circulated to Dato' CS Ong for his comment or confirmation. Rohan also admitted that there was nothing in the plaintiff's notes of meeting which disputed Dato' CS Ong's statement which suggested that the plaintiff did not inform Dato' CS Ong of Mayland as a potential purchaser for the two parcels of land (see the notes of evidence of 8 January 2013 at p 49 lines 3–16).

[132] It is not disputed that a few months after Dato' CS Ong informed the plaintiff that the two parcels of land had been sold and were no longer available for sale, Rohan requested to see Dato' CS Ong and Rohan and Gan did go to see Dato' CS Ong at his office. The sale of the two parcels of land was one of the matters discussed at the meeting. According to Dato' CS Ong, they informed Dato' CS Ong that they did approach Mayland to market the two parcels of land. However, the plaintiff failed to secure its own interest. As Dato' CS Ong

A has known Sulaiman (the proprietor of the plaintiff) for a long time and he had previously worked for Sulaiman, Dato' CS Ong tried to help the plaintiff by suggesting that they request a goodwill payment of RM200,000 for the work they said they had done in introducing the land even though the plaintiff was not entitled to be paid the agency fees.

B

[133] The court found Dato CS Ong to be a truthful witness and the court accepted his testimony that he was prepared to forward such a request for the consideration of the defendant's management and to put in some good words. This is because what he said was not inherently incredible and was more C probably true in view of the facts and circumstances of the instant case and, in particular, Dato' CS Ong's previous employee and employer relationship with Sulaiman. However, his suggestion was, unfortunately, not taken up by the plaintiff. Hence, the court rejected the plaintiff's evidence that it was D appointed the estate agent to sell the two parcels of land to Mayland and/or its subsidiaries as the court was of the view that it was most probably untrue and was made up in order to bolster up the plaintiff's unjustified and baseless claim against the defendant for the sum claimed as the plaintiff's professional fees for the sale of the two parcels of land to Mayland and/or its subsidiaries.

E

[134] The court believed Dato' CS Ong when he said that he had made no promise that the defendant's management would agree to such a request even if it was made. The court also agreed with the defendant's submission that the plaintiff's notes of meeting were clearly a self-serving document. This is F because the court noted that the notes were not mentioned in the pleadings and also the earlier affidavits of the plaintiff affirmed and filed by the plaintiff for use in the instant case. Therefore, since their authenticity and the truth of their contents had been rigorously disputed by the defendant the court refused to allow them to be admitted as evidence against the defendant (see the answer to G question 9 of the witness statement (D18) of Dato' CS Ong and the notes of evidence of 9 January 2013 at p 29, lines 2–10).

[135] The evidence of Tan Sri Lee Kim Yew is relevant and important as it H confirmed the testimony of Low of Mayland that Tan Sri Lee Kim Yew was the person who introduced the two parcels of land to Tan Sri David Chiu of the Mayland Group of Companies.

CONCLUSION

I

[136] In the premises, the dismissal of the plaintiff's claim with costs of RM35,000 is fair and just as there was no positive evidence to establish a valid oral appointment of the plaintiff as an estate agent by the defendant in respect of the sale of the two parcels of land to Mayland and/or the two subsidiaries of

Mayland and in any event the plaintiff has failed to establish that its efforts were the effective cause of the sale of the two parcels of land to Mayland and/or the two subsidiaries of Mayland.

Claim dismissed.

Reported by Ashok Kumar